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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1969

No. 1561

DANIEL T. FRIDENA, *deceased, Petitioner,*

vs.

ARIZONA OSTEOPATHIC MEDICAL ASSOCIATION,
an Arizona Corporation and

PHOENIX GENERAL HOSPITAL, INC.,
an Arizona Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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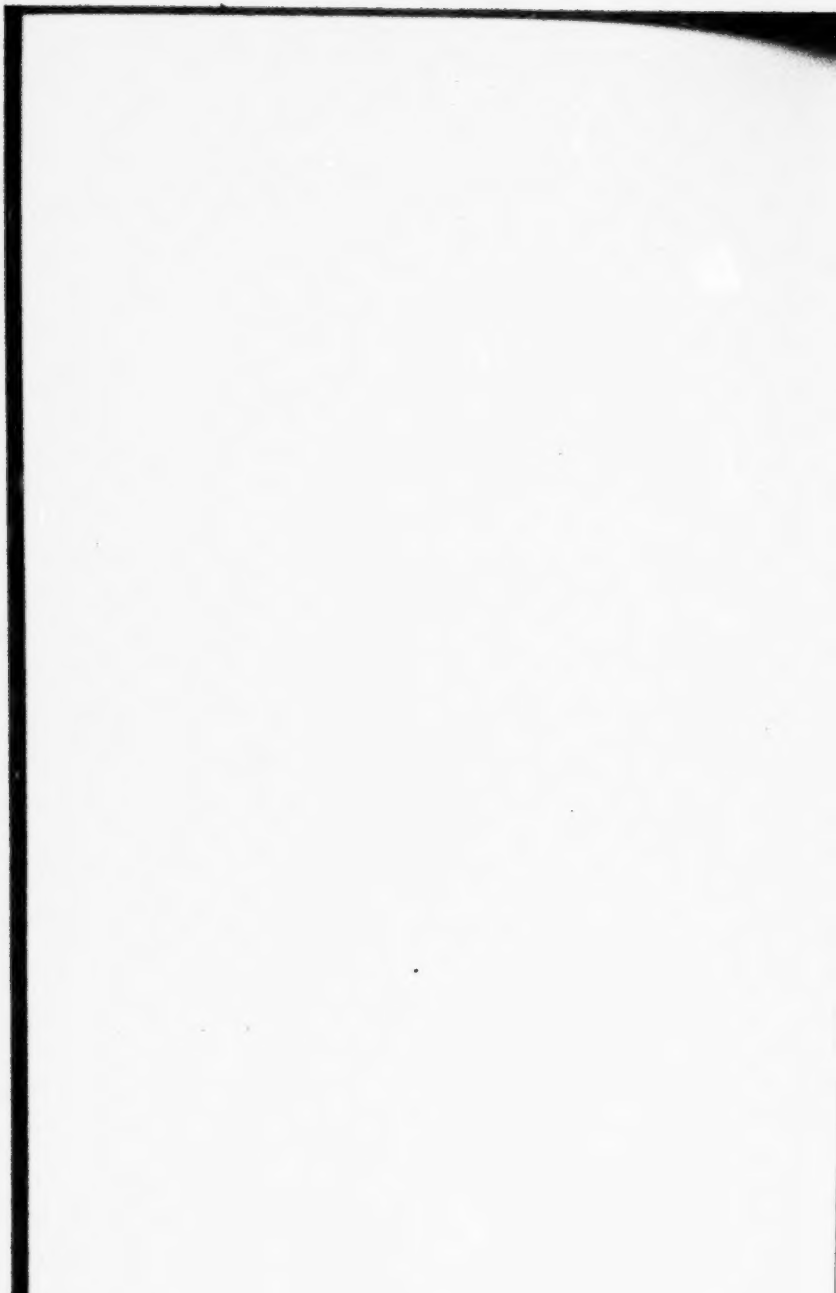

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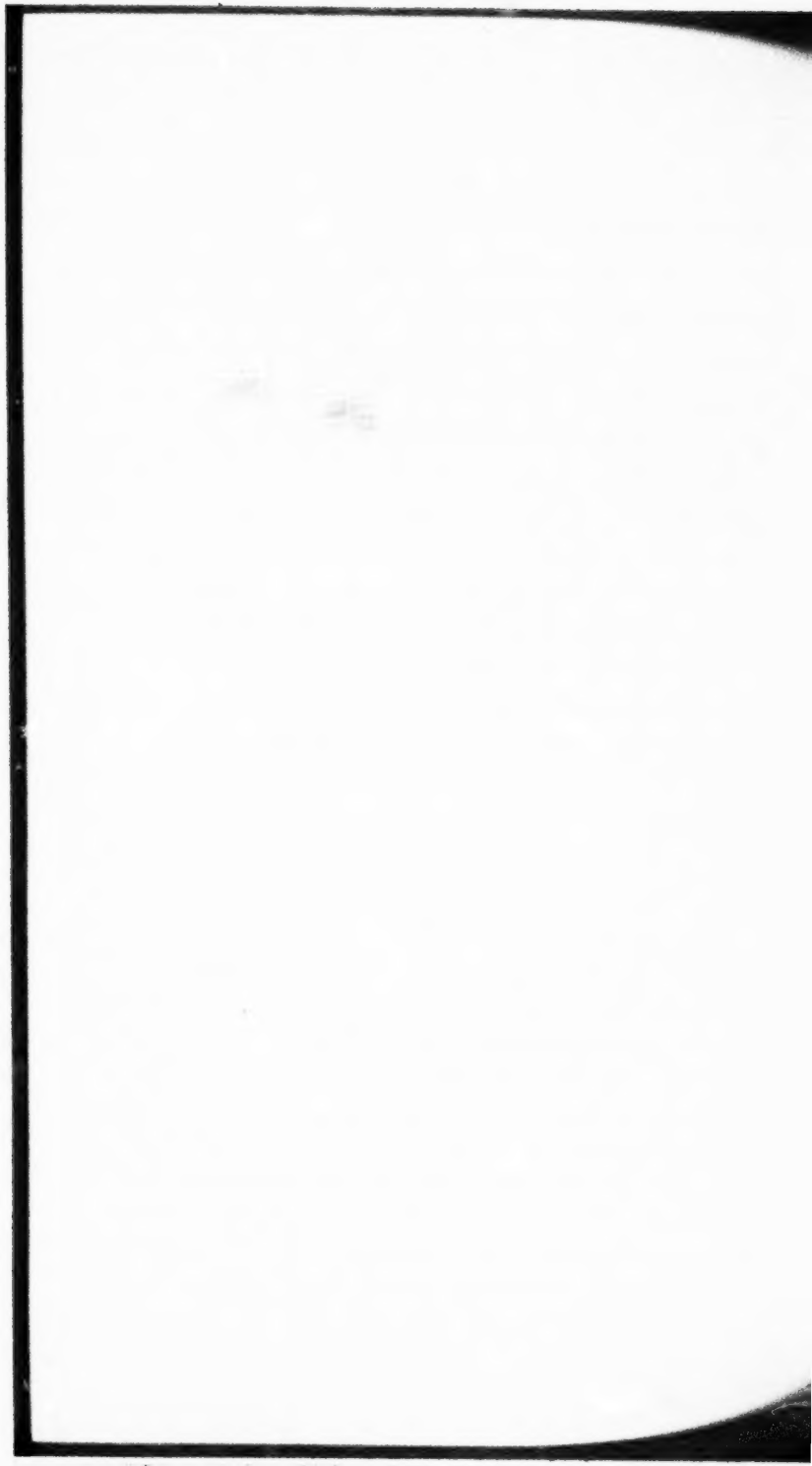

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ARIZONA OSTEOPATHIC MEDICAL ASSOCIATION,
an Arizona Corporation and

PHOENIX GENERAL HOSPITAL, INC.,
an Arizona Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI

COMES NOW your petitioner herein, DANIEL T. FRIDENA, deceased, by and through his counsel, Philip M. Haggerty of the State of Arizona and a member of the Bar of this Court, and respectfully petitions this Court to issue its Writ of Certiorari to the Supreme Court of the State of Arizona to review the decision of that court in that cause entitled, "ARIZONA OSTEOPATHIC MEDICAL ASSOCIATION, et al. vs. DANIEL T. FRIDENA, "No. 9798-PR.

A. DECISION SOUGHT TO BE REVIEWED.

The decision sought to be reviewed is entitled, "ARIZONA OSTEOPATHIC MEDICAL ASSOCIATION, a corporation; and PHOENIX GENERAL HOSPITAL, INC., a corporation, vs. DANIEL T. FRIDENA", No. 9798-PR, Supreme Court, State

of Arizona. It is reported at 105 Ariz., 463 P.2d 825. The text of the opinion is reproduced as Appendix A hereof.

The decision in the Supreme Court of Arizona reversed an earlier decision in the Court of Appeals in the State of Arizona which decision is reported at 10 Ariz. App. 232, 457 P.2d 945 (1969). A copy of that decision is reproduced herein as Appendix B.

B. GROUNDS UPON WHICH REVIEW IS SOUGHT.

1. The opinion of the Supreme Court of the State of Arizona was rendered on January 15, 1970.

2. Petitioner's motion for rehearing was denied on February 11, 1970 and the mandate to the lower court was made and entered on February 17, 1970.

3. The jurisdiction of this Court is founded on 28 U.S.C. 1257 (3).

C. QUESTIONS PRESENTED FOR REVIEW.

I

Is it a violation of the provisions of Section 1, Amendment XIV to the Constitution of the United States for a state court to approve and enforce a procedure by which an individual is deprived of membership in an association and the consequent right to practice in a hospital without notice of hearing of the charges upon which said removal of membership is predicated.

II

Where persons who are purporting to give notice of a hearing and charges which could result in the loss of a valued property right, and the persons providing notice use a means known to them not to be effective as conveying actual notice to the person designated to receive it, and where in fact, it is known at the time of the hearing for which the notice was required that the

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notice was not in fact received by the person to whom the notice was purportedly directed, does this not as a matter of law, constitute inadequate notice and a deprivation of property without due process.

D. CONSTITUTIONAL AND STATUTORY PROVISIONS.

Constitution of the United States

Section II, Amendment XIV, Constitution of the United States:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

E. STATEMENT OF THE FACTS.

This case originated as a Petition for Writ of Mandamus in the Superior Court of Maricopa County. The action was brought by the late Dr. Daniel T. Fridena against the Arizona Osteopathic Medical Association and Phoenix General Hospital, Inc. an osteopathic hospital. The purpose of the writ was to restore the Petitioner herein to good standing as a member of the Arizona Osteopathic Association and to staff membership on the hospital with its pertinent privileges. The petition set forth the basic grievance of the Petitioner to the effect that he had never received any notice of a purported hearing upon which hearing evidence was presented which led to his discharge by the Association. The Petition also made it clear that it was apparent that the only grounds for his loss of staff privileges was his expulsion from the Association and that his loss of staff privileges was also consequently traceable to the lack of notice of the hearing on which the charges leading to his expulsion were made.

Essentially the record indicates the following. Dr. Fridena was a licensed osteopathic physician and at one time, a member of the Arizona Osteopathic Medical Association. The Respondent, Phoenix General Hospital, Inc., is an osteopathic hospital maintained by the Arizona Osteopathic Medical Association. The rules and regulations of Phoenix General Hospital, Inc. require that any physician exercising any staff privileges must be a member of the Arizona Osteopathic Medical Association.

On September 22, 1965, the Petitioner was expelled from the Arizona Osteopathic Medical Association, and the following day received notice of revocation of his staff privileges at the Phoenix General Hospital, Inc. The expulsion from the Association came about essentially in the following way. The Committee of Ethics of the Association had received a number of complaints pertaining to the Petitioner, which generally involved overcharging and over-treatment of patients. In late August or early September of 1965, the Ethics Committee submitted a formal complaint against the Petitioner through the Executive Director of the Association, and the Association by the Executive Director of the Association mailed a copy of the complaint, with a notice to appear before the next meeting of the Board ofTrustees to show cause why his membership in the Association should not be subject to disciplinary action. Pursuant to the by-laws of the Association, this notice was sent by registered mail.

It is herein that the controversy arises. As the Court of Appeals notes in it's decision, the members of the Committee were aware of the fact that the Petitioner habitually never received registered mail. The notices which were provided by the Post Office went unanswered in this and in all other cases in which registered mail was the chosen means of communication. The staff of the Petitioner had been instructed not to receive such mail. This was not only known to the Committee but to the Chairman on the Committee of Ethics, one Dr. C. Condie Call. Dr. Call had been a former associate of the Petitioner and they had engaged in

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some continuing controversy over a period of time prior to this hearing.

On the day of the meeting of the Board of Trustees, September 22, 1965, the Petitioner did not appear and the Board was aware that the Petitioner had not received a copy of the complaint filed against him, together with, the notice of hearing, because these had been returned to the Association by the Post Office Department. Other than this method, no other method was attempted to provide the Petitioner with notice of the hearing. The evidence before the Trial Court and accepted by the Appellate Court was also to the effect that Dr. Call had seen the Petitioner the day of the hearing and did not mention to him the fact that the hearing would be held that evening. That the hearing of the Board of Trustees voted to expel Dr. Fridena.

The Trial Court herein by findings and conclusions found in favor of your Petitioner herein and granted the Writs of Mandamus, 1) to the Association to reinstate Dr. Fridena as a member and 2) to the Hospital to reinstate him to full staff membership and privileges. Pursuant to Arizona statutes, an appeal was taken to the Court of Appeals to the State of Arizona and the decision of the Trial Court was affirmed by that Court and it's opinion rendered on August 20, 1969 and set forth as Appendix B herein. A petition for review was made to the Supreme Court of the State of Arizona, the Petition was granted, and the Appellate Court and Trial Court reversed by the decision complained of herein.

F. QUESTIONS OF CONSTITUTIONAL LAW WERE RAISED PRIOR TO THIS PETITION.

As we have pointed out in our statement of facts, the entire gravamen of the action and the basis for the Writ of Mandamus was a complaint of the Petitioner that he received no notice of the hearing at which he was expelled from the Osteopathic

Association. That this was clearly the gravamen of the action and before all Courts is reflected in the opinions of the Court of Appeals and the Supreme Court of the State of Arizona.

The decisions of the Court of Appeals and the Supreme Court indicate a basic difference in the interpretation of the decision of this court in *Mullane v. Central Hanover Bank and Trust Company* 339 U.S. 306. Both Courts agreed the case was applicable, but differed considerably in their interpretation of that decision.

H. ARGUMENT

Summary

Our plea before the Court is simply to the effect that a private association, or a public one for that matter, may not take advantage of an individual to deprive that individual of a substantial property right. We believe that the undisputed record in this case as reflected in the decisions in the Arizona Appellate Courts make it clear that this is precisely what happened.

Dr. Fridena was a prominent member of a small association of individuals, all of whom were known to each other. This was such a tight little group that it was clear that they even knew his personal habits in refusing to accept registered mail. They knew, therefore not only that he *did* not receive notice of the hearing but that he *would* not receive this notice. Yet nonetheless, the members of this Association, some of whom had personal antagonism towards Dr. Fridena allowed and used this method of procedure to expel him from an association which greatly affected his livelihood and his professional standing.

We are aware that the argument might be raised that the issues herein have become moot through the death of Dr. Fridena. However this fact was known by the Supreme Court of the State of Arizona prior to the rendering of its decision herein and we believe that the issues set forth in its decision and its interpretation of the Court's ruling in *Mullane v. Hanover,* supra ren-

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dered this decision worthy of review. In addition thereto, we have also filed an action in the Superior Court of the State of Arizona in and for the County of Pima arising out of the death of Dr. Fridena and this action is in the nature of an action for wrongful death. Since the future earning capacity of Dr. Fridena is an issue in this action, and since this earning capacity would be affected by the decision of this Court in upholding or reversing the decision of the Supreme Court of the State of Arizona, the action is not moot insofar as the widow and minor daughter of Dr. Fridena are concerned.

Concepts of Due Process Require Proper Notice Procedures in Private Institutions Where Major Property Rights are Involved.

Since 1964, the Courts of Arizona have recognized the fact that doctors are entitled to due process of law with regard to membership in their professional or associations where the membership in that association involves the exercise of quasi governmental power and controls access to hospital facilities. *Blende v. Maricopa County Medical Society,* 96 Ariz. 240, 293 P. 2d 926 (1964). This position is not disputed as being applicable herein by any of the parties to this case. All parties therefore have in effect recognized that the Courts of Arizona undertook to enforce what were previously considered private rights through the public auction action of the judiciary of the state.

Both parties recognized that in accordance with this exercise of the judicial function, a court in determining these rights in bound to require of the private or quasi public association minimal standards of due process in the area of notice and hearings. See for example, *Cunningham v. Burbank Board of Realtors,* 68 Cal. Reporter 653 (1968); *Berberian v. Lancaster Osteophatic Hospital Association, Inc.,* 395 Pennsylvania 257, 149 Atlantic 2d. 456 (1959); *Virgin v. American College of Surgeons,* 42 Ill. App. 352, 192 N.E. 2d. 414 (1963).

We believe therefore, it is preeminently clear as a matter of law of the State of Arizona that the enforcement of the rules and regulations of a private association by the Courts of the state constitute state action and require the application of fundamental principals of due process.

The Mullane v. Hanover Decision Requires the Supreme Court of the State of Arizona to be Reversed.

All parties and Courts herein have recognized that fact that the leading case in the area of constitutional requirements for notice is *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950). This Court in that decision recognized that a fundamental requisite of due process is the opportunity to be heard and that the touchstone could perhaps be best expressed as follows.

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise all interested parties of the pendency of the action and afford them the opportunity to present their objections. [Citations omitted] The notice must be of such a nature as reasonably to convey the required information, ..."

The Court further notes in the same paragraph that in order for constitutional requireemnts to be met, the ones providing notice or the method of providing notice must have "due regard for the practicalities and peculiarities of the case."

Again, this Court in the decision uses language which should be capable of clear and ready understanding by laymen. The Court's language is not sound legalistically but practically in terms of a common understanding of fair play.

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

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We believe that this is the essence of the issue before the Court. The Association here employed a means which they knew would not be effective as to providing actual notice to Dr. Fridena. However logical and proper and reasonable the means might be with reference to other individuals, the Association had actual knowledge of the fact that it would not notify Dr. Fridena, was not a means calculated to inform him of the pendency of any action, and in point of fact, had not informed him.

Against this background, the Association also knew of means which would actually provide him with notice and that was the simple expedient of mailing a letter other than registered. Other means which could have been employed, and in fact were employed as part of these proceedings were the personal delivery of the notice. The Association was aware of the fact that Dr. Fridena received ordinary mail and in point of fact did actually inform him of the results of the hearing and the suspension of his staff privileges at Phoenix General Hospital, Inc. by delivering a copy of that decision to him.

The trial court herein, found in effect that the method of purported notice used by the Association was in this instance, calculated not to achieve notice. The trial court had before it direct evidence of personal antagonism and hostility between members of the Association, including the leading prosecutor as it were, the chairman of the Committee on Ethics, and your Petitioner and the Respondent in those proceedings. The Respondent herein, the Osteopathic Association, used a device which on the surface was intended to insure notice and fair play as a trick to ensure them that no notice would actually be given and that no opportunity to be heard in fact ensue. The deceit practiced by the Association herein is totally contrary to the fundamental notions of due process and fair play and it merely encourages trickery and deceit and false appearances of due process in the future. It is therefore respectfully submitted that the decision of the Supreme Court of the State of Arizona distorts the true meaning and intent

of the decision of this Court in *Mullane v. Central Hanover Bank and Trust Company*, supra and that it deprived this Petitioner of his right to membership benefits in the Osteopathic Medical Association and staff privileges at Phoenix General Hospital, Inc. without due process and as the result of a direct and successful attempt to frustrate due process.

IN CONCLUSION

It is therefore respectfully submitted that the decision of the Supreme Court of the State of Arizona be vacated and that the decision of the Court of Appeals of the State of Arizona be reinstated.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

RIZONA OSTEOPATHIC MEDICAL SSOCIATION, a corporation, nd PHOENIX GENERAL HOSPITAL, NC., a corporation, Appellants, v. ANIEL T. FRIDENA, Appellee.	NO. 9798-PR

Appeal from the Superior Court of Maricopa County

Honorable Warren L. McCarthy, Judge

Court of Appeals Opinion Vacated

Remanded with Instructions

---

ewis Roca Beauchamp & Linton — Phoenix
By Roger W. Kaufman

Attorneys for Appellants

ykes, Selden, Bayham & Fike — Phoenix
By Alan P. Bayham

Attorneys for Appellee

AYS, Justice

On October 9, 1969, the Arizona Osteopathic Medical Associa-on and the Phoenix General Hospital, petitioners, sought review

by this court of a decision of the Court of Appeals. Arizona Osteopathic Medical Assn. v. Fridena, 10 Ariz. App. 232, 457 P.2d 945 (1969). We granted the petition for review on October 28, 1969.

The case involves an appeal from the trial court's issuance of two writs of mandamus requiring the petitioners to restore to Dr. Fridena, an osteopathic physician, his membership in the petitioner medical association and his former position on the staff of the petitioner hospital. The Court of Appeals affirmed the trial court's issuance of the writs, holding that Dr. Fridena was not given proper notice of the disciplinary proceedings against him and that therefore the revocation of his membership in the medical association and the loss of his position on the hospital staff were invalid because they did not conform to the requirements of due process of law.

In December of 1969, Dr. Fridena died in Tucson, thereby making the question of restoration of his membership in the association and position on the hospital staff moot. See Arizona State Bd. of Directors for Junior Colleges v. Phoenix Union High School District of Maricopa County, 102 Ariz. 69, 424 P.2d 819 (1967). Despite the mootness of this case, however, we feel that the Court of Appeals' handling of the question of adequate notice deserves some discussion. We have previously held that an appellate court has the discretion to decide questions which have become moot. Board of Examiners of Plumbers of City of Phoenix v. Marchese, 49 Ariz. 350, 66 P.2d 1035 (1937).

Complaint and disciplinary procedures of the Arizona Osteopathic Medical Association are contained in the by-laws of that organization. Dr. Fridena, who at one time was a member of the Committee on Ethics of the association, was familiar with the procedures outlined in the by-laws. The by-laws specifically provided that notice to members of pending disciplinary proceedings against them was to be transmitted by registered mail. No other form of notice was provided. The Court of Appeals held that under the circumstances of this case, notice by registered mail, although in

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accordance with the association's by-laws, was inadequate to properly apprise Dr. Fridena that disciplinary proceedings had been initiated against him. We disagree.

The record indicates that Dr. Fridena himself was responsible for the fact that registered letters sent to him by the medical association were not claimed. He had instructed his employees not to accept registered mail, and when notices arrived that registered mail was waiting for him at the post office he habitually failed to pick up that mail. Dr. Fridena knew that the registered mail addressed to him was from the petitioner medical association. In addition, he was aware that the association had previously been considering disciplinary proceeding against him.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) sets forth the constitutional requirements for adequate notice in situations such as Dr. Fridena' disciplinary proceedings:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . The notice must be of such nature as reasonably to convey the required information, . . . and it must afford a reasonable time for those interested to make their appearance . . . . But if with due regard to the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." 339 U.S. at 314.

We think that the registered letters sent to Dr. Fridena were reasonably calculated, under all the circumstances, to apprise him of the proceedings against him, and we cite with approval the case of Robel v. Highline Public Schools District No. 401, King County, 65 Wash. 2d 477, 398 P.2d 1 (1965), where a school board notified one of its teachers, by registered mail, that it was considering the non-renewal of her employment contract the following year. The teacher was aware of the customary procedures

for notice, yet she failed to call for her mail, even though she had received at least one "mail arrival notice." The Washington Supreme Court upheld her subsequent dismissal from employment, and held that under the circumstances notice by registered mail was adequate.

The opinion of the Court of Appeals is vacated. We remand this case to the trial court, and direct that court to enter an order quashing the writs of mandamus.

JACK D. H. HAYS, Justice

CONCURRING:

LORNA E. LOCKWOOD, Chief Justice

FRED C. STRUCKMEYER, JR., Vice Chief Justice

JESSE A. UDALL, Justice

ERNEST W. McFARLAND, Justice

APPENDIX B

IN THE COURT OF APPEALS
STATE OF ARIZONA

DIVISION ONE

ARIZONA OSTEOPATHIC MEDICAL ASSOCIATION, a corporation, and PHOENIX GENERAL HOSPITAL, INC., a corporation, Appellants, v. DANIEL T. FRIDENA, Appellee.	1 CA-CIV 670

Appeal from the Superior Court
of Maricopa County

Cause No. 190727

Honorable Warren L. McCarthy, Judge

Affirmed.

Lewis Roca Beauchamp & Linton, Phoenix, by Roger W. Kaufman,

Attorneys for Appellants.

Dykes, Selden, Bayham & Fike, Phoenix, by Alan Philip Bayham,
Attorneys for Appellee.

This is an appeal from the issuance of two writs of mandamus[1] requiring that the petitioner, an osteopathic physician, be restored to membership in the Arizona Osteopathic Medical Association and restored to membership and to his position on the staff of the respondent Phoenix General Hospital, Inc.

There are two questions raised on review. The first concerns whether there was sufficient notice and an opportunity to be heard afforded to the petitioner prior to his expulsion from the Association on September 22, 1965.

Under the Bylaws of the Arizona Osteopathic Medical Association, all ethical complaints are referred to its Committee on Ethics. This Committee is required to make an investigation of the complaint against one of its members and, at the conclusion of its investigations, it may dismiss the complaint, reprimand the accused member, or it may recommend that the accused's membership in the Association be suspended or revoked. If the latter is its decision, the Committee is required to file written charges with the Board of Trustees. When such charges are filed, the Bylaws require that the Committee "* * * shall send a copy thereof by registered mail to the accused member." The Bylaws further provide that "[u]pon *receipt* of such notice from the Committee, the accused member shall have ten days in which to notify in writing the Board of his rejection of the conclusions and decision of the Committee on Ethics and if he so desires, he may apply in writing to the Board for a hearing which shall be granted to him." (Emphasis added.)

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[1] In Blende v. Maricopa County Medical Society, 96 Ariz. 240, 393 P.2d 926 (1964), our Supreme Court held that a writ of mandamus is an appropriate remedial measure to restore a medical doctor to membership in the Maricopa County Medical Society, when membership in this society was a prerequisite to access to local hospital facilities. In this case, it is admitted that, at the time with which we are concerned, it was a prerequisite to use of the Phoenix General Hospital that doctors be members in good standing of the Arizona Osteopathic Medical Association. The historical origin of the use of a writ of mandamus for this purpose is delineated at 34 Am. Jur. Mandamus § 98, at p. 885.

In this case, the Committee on Ethics received a number of complaints pertaining to the petitioner which generally involved over charging and continuing to treat patients when his services were no longer necessary. The complaints upon which the Committee acted were received in the latter part of 1964 and early 1965. During these years, the Committee on Ethics was co-chaired by Paul Edgar and C. Condie Call, doctors of osteopathy. However, as to these particular complaints, Dr. Call served as the "acting chairman" and was the person upon whom the Committee relied to give notice of its various proceedings to the petitioner. At all times concerned, Dr. Call was involved in a bitter controversy with the petitioner over their joint business interests in two other osteopathic hospitals in the Phoenix area. Dr. Call, in his testimony to the trial court, frankly admitted that he bore "resentment" against petitioner.

It is clear in this record that the Committee mailed various notices to the petitioner of its various meetings and did on occasion telephone him to inform him of a meeting. Most of the meetings of the Committee were ignored by the petitioner but he did appear before it on at least two occasions. At the time of the first of these appearances, the Committee voted to absolve him from any censure, but subsequently voted to bring formal charges against him before the Board of Trustees.

The undisputed evidence is that the petitioner kept rather unusual office hours, usually not coming into his office until 6 p.m., and then working on to a late hour. The petitioner's treatment of registered mail was also unusual. He had instructed the personnel in his office, which was open during the daytime, not to accept registered mail, and, when he received notices of the arrival of such mail, the petitioner habitually failed to pick up the mail from the post office. The fact that the petitioner had these eccentricities was well-known to the members of the Committee on Ethics, and to the Board of Trustees of the Association.

The formal complaint filed against the petitioner by the Ethics

Committee was submitted to the executive director of the Association sometime in August, or September, of 1965. The executive director thereupon mailed a copy of the complaint to the petitioner, by registered mail, which apparently[2] contained a notice to appear before the next meeting of the Board of Trustees to show cause why his membership in the Association should not be subject to disciplinary action.

The next meeting of the Board of Trustees was held on September 22, 1965, and at this meeting petitioner did not appear. At the time of this meeting, the Board was well aware that the petitioner had not received a copy of the complaint filed against him because the complaint had been returned to the Association by the postal authorities prior to this meeting. Other than the mailing of this registered letter, no other effort was made to notify the petitioner of the meeting at which he was expelled. On the afternoon of the meeting, Dr. Call and the petitioner weer together, discussing mutual business affairs, but Dr. Call made no mention to the petitioner of the impending meeting in the evening at which disciplinary action was to be determined. The petitioner testified that when he had received notices of registered mail previously, in connection with the investigation of the Committee on Ethics, he had talked over the telephone with Dr. Call to inquire as to the purpose of these communications from the Association and had been informed by Dr. Call: "It wasn't important. Forget it. I'll take care of it for you."

The charges against the petitioner were presented to the Board at its September 22 meeting by Dr. Call and expulsion was voted. The petitioner was given no notice whatsoever of any proceeding to revoke his membership in the Phoenix General Hospital and to remove him from ist staff. This action was taken on September 23, 1965, on the basis of the expulsion on the previous day by the

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[2] The record does not contain a copy of this complaint and we are relying upon the testimony of Mr. Stanley N. Schultz, the executive director, as to its contents.

Association. Notice of revocationof his hospital privileges was hand-delivered to the petitioner on September 24, 1965.

This case was submitted to the court without a formal trial on the basis of depositions and the testimony of petitioner taken in a related civil action. This other civil action was tried before the same trial judge who rendered decision of this case. The evidence submitted contains very little evidence as to the substantive reasons for the expulsion of the petitioner, the contentions below and here being centered on the question of whether there was procedural process. We believe that the decision reached, nullifying the expulsions, is justified from this standpoint.

When membership in an association or corporation is a necessary prerequisite to practicing a profession or a trade, the accused member has a right to a reasonable and adequate notice of the hearing at which the termination of his membership is to be considered and, at such a hearing, he must be afforded a reasonable opportunity to be heard. See Cunningham v. Burbank Board of Realtors, 262 A.C.A. 237, 68 Cal. Rptr. 653, 655 (1968), and cases cited; Swital v. Real Estate Commissioner, 116 Cal. App.2d 677, 254 P.2d 587, 588 (1953); The Florida Bar v. Fussell, 179 So.2d 852 (Fla. 1965); Virgin v. American College of Surgeons, 42 Ill. App. 352, 192 N.E.2d 414, 423 (1963); Berberian v. Lancaster Osteopathic Hospital Ass'n, Inc., 395 Pa. 257, 140 A.2d 456 (1959); Blenko v. Schmeltz, 362 Pa. 365, 67 A.2d 99, 20 A.L.R. 2d 523 (1949). *See also* Developments in the Law: Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 1028 (1963); Annot., 20 A.L.R.2d 531, 542; and the articles collected in the paragraph corresponding with unofficial headnotes 2-4 in Higgins v. American Society of Clinical Pathologists, 51 N.J. 191, 238 A.2d 665, at 669-670 (1968).

When there is a clearly provided requirement of notice in the controlling regulations of such a society for the giving of notice, it is our view that such requirements must be substantially met.

See, e.g., Berberian v. Lancaster Osteopathic Hospital, Ass'n, Inc., *supra,* at 149 A.2d 459; Virgin v. American College of Surgeons, *supra;* American Institute of Real Estate Appraisers v. Hawk, 436 S.W.2d 359, 364-65 (Tex. Civ. App. 1968); 76 Harv. L. Rev. 983, at 1021 et seq.

However, if such bylaw standard is insufficient to provide "* * * notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections * * *," Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950), then such additional notice as may be necessary to meet this constitutional minimum must be given.

When a person to be given notice intentionally avoids receipt of notice, then there may be occasions when a court is justified in holding that such person has waived his constitutional rights in this regard. *See* Robel v. Highline Public Schools, 65 Wash. 2d 477, 398 P.2d 1 (1965). But the evidence here does not compel a reversal of the trial court's finding that insufficient notice was given.

While the petitioner was undoubtedly extremely lax in representing his interests before the Committee on Ethics, we do not believe that this necessarily waived his right to be given notice of the hearing at which effective action could be taken to suspend or expel him. The petitioner may very well have come to the conclusion that, with Dr. Call in charge of the Committee making the preliminary investigation, his chances of avoiding formal charges were not bright. However, the petitioner, as a former member of the Committee on Ethics and a former member of the Board of Trustees, must have known that the Bylaws foreclosed the Committee on Ethics from taking any final action against him, other than a reprimand.

The Bylaw provisions involved here are at least ambiguous as to whether the registered letter notice of the complaint must

be received in order to be effective. But, regardlss of th construction in this regard, we believe the trial court was justified in finding that the notice given did not meet constitutional minimums. Among the "circumstances" which we believe the Board of Trustees should have taken into consideration in this case were the eccentricities of this particular member, who, as a matter of practice, did not receive registered mail. It would have been a small burden to have sent a copy of these charges to the petitioner by ordinary mail, which the Committee on Ethics and the Board of Trustees knew the petitioner customarily received. The fact that the respondents were able to notify petitioner so promptly of his expulsion is some indication that, if there had been a good faith effort to notify the petitioner of this particular proceeding, he would have received notice of it.

The other question presented for review is whether the pendency of another civil action brought by the petitioner, as plaintiff, against these respondens and others, and asking for damages and an injunction restoring him to membership, deprived this court of jurisdiction to proceed with this subsequently filed mandamus action. Reliance is taken upon the law of abatement and decisions such as Davies v. Russell, 84 Ariz. 144, 325 P.2d 402 (1958), and Falcone v. Middlesex County Medical Society, 47 N.J. 92, 219 A.2d 505 (1966).

These decisions, and many others, establish that when there are two actions pending between the same parties as to the same cause of action, in the same jurisdiction, on proper motion, the second action should be abated, *see* Allen v. Superior Court of Maricopa County, 86 Ariz. 205, 344 P.2d 163 (1959). But the defect in the later-filed case is not such as to render proceedings in that action void. Crook v. Crook, 19 Ariz. 448, 452, 170 P. 280, 282 (1918), and *Allen, supra,* 86 Ariz. at 209. A plea in abatement because of another action pending is dilatory in nature and not favored by the courts. Perry v. Jordan, 34 Cal. 2d 87, 207 P.2d 47, 48 (1949). If, without persisting in an objec-

tion to the second action to the extent of obtaining a writ to prohibit further proceedings, *see* Allen v. Superior Cour of Maricopa County, *supra,* the parties proceed to a trial in the second action and obtain an adjudication on the merits, it is our view that such an adjudication has efficacy.

Our Constitution proscribes reversal for "technical error in pleading or proceedings." Ariz. Const. art. 6, § 27. In a jurisdiction in which the trial court has the prerogative, on its own motion, to separate out issues for trial, Rule 42(b), R. Civ. P., 16 A.R.S., as amended, it seems less than fundamental that this trial took place in a proceeding that may have had the wrong number.

The following stipulation indicates that *these* parties were ready and willing to submit *this* controversy to *this* judge:

> "Counsel for petitioner and respondents hereby stipulate *that the question of whether or not petitioner has a right to a writ of mandamus may be decided by this Court* based upon the pleadings filed to date, the Derfelt transcript [the related civil action], the depositions taken in this cause, and all memoranda of law." (Emphasis added)

Once a case has been submitted in this manner and an adjudication rendered on the merits of a controversy, it is our view that it is too late then to question whether the second action should have been abated in preference to the first.

Judgment affirmed.

.....

JOHN F. MOLLOY,
Judge.

CONCURRING:

.....

JAMES D. HATHAWAY,
Judge.

NOTE: This cause was decided by the Judges of Division Two as authorized by § 12-120(E).

KRUCKER, Judge, Dissenting.

I regret that I must dissent, not being able to agree with the opinion of my esteemed colleagues on the question of notice. I believe this to be a question of law and not a question of fact. It is undisputed that notice was sent to Dr. Fridena in strict and full compliance with the by-laws of the Association. This is admitted by Dr. Fridena himself in his testimony.

I believe, contrary to the majority opinion, that the Association did follow its by-laws to the letter and that any failure to receive the notice was entirely due to the fact that Dr. Fridena, through his own actions, circumvented the receipt of notice by instructing his employees not to receive registered mail and having them return the same to the post office. Dr. Fridena received these registry slips, had his employees investigate at the post office and knew that the notices were from the Association.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), cited by the majority, is not in point. In that case, the trust company failed to send notice by mail to those members of a trust fund for which it had addresses, and, instead, notified everyone by publication. The Court clearly held that those with known addresses had to be sent individual notices. Such is not the case here.

The Arizona Supreme Court has held that registered mail *is* a method reasonably calculated to give notice under the due process concepts, and that proof of mailing of the registered letters is compliance with those requirements, whether or not the individual actually receives the notice. Goodman v. Jones, 102 Ariz. 532, 433 P.2d 980 (1967).

In Robel v. Highline Public Schools District No. 401, King County, 65 Wash.2d 477, 398 P.2d 1 (1965), cited by the majority, a school teacher was sent regular registered mail and at least one notice of the arrival of such. She knew the customary procedures and that her employment contract was recommended

for non-renewal, yet she failed to call for or request delivery of her mail. The court held her dismissal was valid and that she could not close her eyes to such notice. The majority opinion states that the instant case does not have the same compelling evidence as *Robel,* but I disagree. In this case, formally drawn charges were sent by registered mail to Dr. Fridena, who had at one time been a member of the Ethics Committee. He knew that charges were pending because he had previously appeard before that Committee and received a letter of reprimand. Dr. Fridena asked his secretary who had been sending the registered mail and was told it was the Association. He still refused to let the office receive the mail. I think *Robel* is clearly in point in this case.

I strongly disagree that the Association was bound to take into consideration the peculiar eccentricities of this particular member by sending him regular mail and/or phoning him until he had actual notice. I believe the majority view stated in 39 Am.Jur. § 12 is the better rule:

> "When a party has information or knowledge of certain extraneous facts which of themselves do not amount to, nor tend to show, an actual notice, but which are sufficient to put a reasonably prudent man upon an inquiry . . . then the party is absolutely charged with a constructive notice. . . . A person has no right to shut his eyes or his ears to avoid information, and then say that he had not notice; he does wrong not to heed the 'signs and signals' sent to him."

There is some testimony that Dr. Fridena inquired of Dr. Call about the notices. Dr. Call not only denies these conversations, but I believe a board member should not deal individually with a member against whom a complaint is pending. It must also be noted that Dr. Fridena was fully familiar with the by-laws and rules of the Association and knew the registered mail from the Association had a special and important connotation. I cannot conceive of two rules coexisting, one for members who are eccentric and another for members who are not. If this were the case, any member of the Association could avoid notice by acting

in an abnormal and eccentric manner in the way he handled his business and ran his office. I do not believe that the rule as to giving notice to a member, as provided for in the by-laws, should differ or be changed to fit the odd and peculiar notions of a particular member.

I concur with the majority position on the question of splitting of actions.

The judgment of the trial court in granting the writ of mandamus should be reversed.

.....

HERBERT F. KRUCKER, Judge

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1561

DANIEL T. FRIDENA, *deceased, Petitioner,*

vs.

ARIZONA OSTEOPATHIC MEDICAL ASSOCIATION, an Arizona Corporation and PHOENIX GENERAL HOSPITAL, INC., and Arizona Corporation,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

This is a petition for a writ of certiorari to the Supreme Court of Arizona. The substance of the matter is whether petitioner had adequate notice for dismissal from a medical association. The decision of the court below was filed on January 15, 1970, and a petition for rehearing was denied on February 10, 1970. This petition for certiorari was filed on May 11, 1970. Jurisdiction in this court is claimed under 28 U.S.C. § 1257(3) and, for reasons set forth in the memorandum following, is opposed on the ground of mootness.

STATEMENT

Fridena was an osteopath in Arizona who was expelled from the Arizona Osteopathic Medical Association and from Phoenix General Hospital, Inc. The expulsion from the hospital followed the expulsion from the Association, and the latter is the critical matter.

The bylaws of the Association provided for notice by registered mail. Fridena was well acquainted with these bylaws, having been a member of the ethics committee of the organization as well as a member of its board of trustees; and he had full experience with these bylaws. However, as is apparent from the record here, Fridena was something of an eccentric. He did not allow his employees to receive registered mail in the office and would not himself call for it at the post office.

In the instant case, Fridena had attended a preliminary conference with the appropriate Association committee and was aware that, if the committee thought proper, a formal hearing would follow. A copy of a formal complaint was then sent to Fridena by registered mail. Fridena's employees declined to accept the communication which was returned to the post office. Fridena then had an employee telephone the post office, learned that the communication to him was from the Association, and declined to take possession of it. It was returned to the Association.

The Association thereupon met and expelled Fridena, who did not appear.

Subsequently, Fridena instituted an action for a writ of mandamus to require his reinstatement in both organizations. No other relief was sought nor was possible within the scope of the mandamus action. While the matter was pending, Fridena died.

Under Arizona practice, a moot matter may, at the discretion of the court, be considered. The Arizona Supreme Court recognized that the matter was moot, but nonetheless saw fit to hold that the notice to Fridena met all legal standards. This petition followed.

QUESTIONS PRESENTED

1. Will this Court hear a claim for reinstatement in an organization where the claimant has died?

2. Under what circumstances is a bona fide effort to serve notice by registered mail adequate to meet constitutional standards?

REASONS FOR DENYING THE WRIT

1. This matter is moot. Some state jurisdictions will give advisory opinions, and, illustratively, Arizona did conclude to decide here what is obviously a moot matter. But this is not the federal practice; here no relief could conceivably be given and the matter is totally abstract. Upon the death of a petitioner, a mandamus case becomes moot and cannot be heard; *Fletcher v. Bryan,* 361 U.S. 126, 80 S. Ct. 263, 4 L. Ed. 2d 180 (1959). The petition becomes a pure request for an advisory opinion, which this Court will not give. *Brockington v. Rhodes,* 396 U.S. 41, 90 S. Ct. 206, 24 L. Ed 2d 209 (1969); *Hall v. Beals,* 396 U.S. 45, 90 S. Ct. 200, 24 L. Ed. 2d 214 (1969); *Golden v. Zwickler,* 394 U.S. 103, S. Ct. 956, 22 L. Ed. 2d 113 (1969).

2. The notice was sufficient; no conflict is presented nor does the case present any important question. At most it depends totally on its facts.

Arizona follows the practice that mail notice may be given when expressly authorized, *Goodman v. Jones,* 102 Ariz. 532, 433 P. 2d 980 (1967), though not when it is not authorized; *see Glidewell v. Talley,* No. 9843 (Ariz. April 13, 1970), expressly distinguishing *Fridena* on the ground that without some clean-cut establishment of a proper address, mail notice might fail to apprise a respondent of the charges against him.

The Constitution requires nothing more. A person may not insulate himself from notice by rejecting formal mail where he has been fully informed, as Fridena was, that this is the method of sending notice. *Creadick v. Keller,* 35 Del. 169, 160 A. 909 (1932); *Cherry v. Heffernan,* 132 Fla. 386, 182 So. 427 (1938).

The notice was in fact taken to Fridena. Nothing in the due process clause required that is be carried by a process server rather than a mailman. Service by registered mail has been "of unquestioned validity" since *Hess v. Pawloski*, 274 U.S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927), 4 Wright & Miller, *Federal Practice & Procedure*, 294 (1969). All that is required of mail notice is that it be designed "so as to make it reasonably probable that [the defendant] will receive actual notice," *Wuchter v. Pizzuti*, 276 U.S. 13, 19, 48 S. Ct. 259, 72 L. Ed. 446 (1928). A return receipt is not constitutionally required, and is very commonly not used in the non-resident motorist cases, M. Jox, *Non-Resident Motorists Service of Process Acts*, 33 F.R.D. 151, 189 (1963). *See Rowan v. Post Office Dept.*, 38 U.S.L.W. 4343 (May 4, 1970), which upholds as meeting due process requirements Title III of the Postal Revenue & Federal Salary Act of 1967, which includes, as here, the use of registered mail as the device of giving notice of a claimed offense. Fridena deserves no sympathy—he was simply hiding out. The notice was fully up to the standard of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

LEWIS & ROCA

By John P. Frank
Roger W. Kaufman
P. Robert Moya

June, 1970.